

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

SANGHAMITRA BASU ,

Plaintiff,

Case No.: 2:20-cv-01432-JCM-BNW

V.

## ORDER

MASSACHUSETTS MUTUAL LIFE  
INSURANCE COMPANY ,

Defendant.

Presently before the court is plaintiff Sanghamitra Basu (“plaintiff”)’s motion to reconsider (ECF No. 84) this court’s amended order granting partial summary judgment to defendant. (ECF No. 83). Defendant Mass Mutual Life Insurance Company (“defendant”) filed a response (ECF No. 86), to which plaintiff replied (ECF No. 88).

Also before the court is plaintiff's motion to reconsider the amended order insofar as it strikes expert Terry Van Noy's expert report. (ECF No. 85). Defendant filed a response (ECF No. 87), to which plaintiff replied (ECF No. 89).

## I. Background<sup>1</sup>

<sup>1</sup> Plaintiff's motion for reconsideration makes much of the fact that, in the original order granting partial summary judgment, the court cited to the complaint as it recounted the case's facts. Setting aside the fact that plaintiff's complaint is admissible evidence in the Ninth Circuit, *see Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995); *Allen v. U.S.*, No. 03-cv-01358, 2012 WL 1242167, at \*5, n.3 (D. Nev. Apr. 24, 2012), this court fails to understand how it committed clear error or was manifestly unjust to the plaintiff when it used the complaint she submitted to recount the factual basis for the decision. Likewise, it is unclear to the court why plaintiff argues that on summary judgment every allegation in the complaint must be taken as true as it would be at the motion to dismiss stage. Regardless, the statement of undisputed facts, while largely unchanged, now cites to other items in the record to support the factual propositions contained within.

1        This action is an insurance dispute arising from a slip and fall incident at the Miracle  
 2 Mile Shops in Las Vegas. The following facts are undisputed. Plaintiff, a pain management  
 3 physician, slipped and fell at the shops on or about August 25, 2012. (ECF No. 54-3 at 2). At  
 4 the time of her fall, she had an insurance policy with defendant. *See* (ECF No. 54-1). That  
 5 policy required defendant to pay total disability benefits if the insured could not perform the  
 6 primary duties of her occupation due to injury. (*Id.*) The policy also limited payments to 24  
 7 months for any disability “caused or contributed to by a Mental Disorder.” (*Id.* at 16).

8        Following her fall, plaintiff was diagnosed with several spinal injuries, which allegedly  
 9 have caused her continuing pain and cognitive impairment. (ECF No. 60-2 at 7). In early 2016,  
 10 plaintiff filed a disability claim with defendant. (ECF No. 54-3). Plaintiff provided medical  
 11 records that purported to show that she was “totally disabled” under the policy due to a physical  
 12 disability. (ECF No. 60-15; 60-16). Defendant disagreed with that characterization and  
 13 conducted its own investigation of her alleged disability, but conditionally approved the claim on  
 14 October 27, 2016. (ECF No. 54-18). Throughout its investigation, defendant paid benefits to  
 15 plaintiff under a “reservation of rights.” (*Id.*; ECF Nos. 54-28; 54-29; 54-38; 54-55).

16        Based on its review of plaintiff’s medical records and consultation with its retained  
 17 medical professionals, defendant eventually determined that plaintiff’s disability was the result  
 18 of a mental disorder under the policy. (ECF No. 54-55). Thus, on December 14, 2019,  
 19 defendant informed plaintiff that it would be discontinuing payment of benefits under the mental  
 20 disorder limitation. (*Id.*)

21        Plaintiff now brings this action for compensatory and punitive damages asserting that  
 22 defendant breached its insurance contract, contravened the implied covenant of good faith and  
 23 fair dealing, and violated Nevada Revised Statute § 686A.310. *See* (ECF No. 1-1 at 13–15).  
 24 Defendant moved for summary judgment on the claims for violation of the implied covenant of  
 25 good faith and fair dealing and NRS § 686A.310, punitive damages, and as to the burden of  
 26 proof on the plaintiff’s breach of contract claim. (ECF No. 54). Defendant also moved to strike  
 27 the expert report of plaintiff’s expert Terry Van Noy. (ECF No. 63).

28        //

1        This court struck Mr. Van Noy's report and granted defendant summary judgment on all  
 2 grounds except the breach of contract claim on September 15, 2022. (ECF No. 82). The court  
 3 issued an amended order the following week to correct a typographical error. (ECF No. 83).  
 4 Plaintiff now moves to reconsider those orders, arguing that the court should reconsider its  
 5 decision to strike Mr. Van Noy's report (ECF No. 85), as well as its decision on granting partial  
 6 summary judgment (ECF No. 84).

7 **II. Legal Standard**

8        Rule 59(e) "permits a district court to reconsider and amend a previous order[;]"  
 9 however, "the rule offers an extraordinary remedy, to be used sparingly in the interests of finality  
 10 and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003)  
 11 (internal quotations omitted). A motion for reconsideration "should not be granted, absent  
 12 highly unusual circumstances." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th  
 13 Cir. 2000).

14        On one hand, a motion for reconsideration "may not be used to raise arguments or present  
 15 evidence for the first time when they could reasonably have been raised earlier in the litigation."  
 16 *Kona Enters., Inc.*, 229 F.3d at 890. On the other hand, "[a] movant must not repeat arguments  
 17 already presented unless (and only to the extent) necessary to explain controlling, intervening  
 18 law or to argue new facts. A movant who repeats arguments will be subject to appropriate  
 19 sanctions." LR 59-1(b).

20        Thus, the Ninth Circuit has provided that "[r]econsideration is appropriate if the district  
 21 court (1) is presented with newly discovered evidence, (2) committed clear error or the initial  
 22 decision was manifestly unjust, or (3) if there is an intervening change in controlling law."  
 23 *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); Fed. R. Civ. P. 60(b).  
 24 "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the  
 25 judgment." Fed. R. Civ. P. 59(e).

26 **III. Discussion**

27        a. Motion to Reconsider Striking the Expert Report

1 Plaintiff moves this court to reconsider its decision striking Terry Van Noy’s expert  
 2 report. (ECF No. 85). In its previous order, this court determined that Mr. Van Noy was  
 3 qualified as an expert, but his report was inadmissible because it embraced several ultimate  
 4 conclusions of law. (ECF No. 83 at 9). Curiously, plaintiff reads the order to exclude Mr. Van  
 5 Noy as a witness entirely. It does not. It strikes only his expert report. (*Id.* at 9) (“Because the  
 6 opinions expressed in Van Noy’s expert report are nearly all legal conclusions, defendant’s  
 7 motion to strike *that report* is granted.” (emphasis added))

8 Regardless, plaintiff presents nothing necessitating reconsideration of this court’s order.  
 9 There is no evidence presented that the court did not consider when it adjudicated the motion,  
 10 and there has been no intervening change in controlling law. So, to reconsider its order, this  
 11 court must find that it committed clear error or there was some manifest injustice in its decision.  
 12 It finds none.

13 An insurance bad faith claim is predicated on “the absence of a reasonable basis for  
 14 denying benefits and the defendant’s knowledge or reckless disregard of the lack of a reasonable  
 15 basis for denying the claim.” *Falline v. GNLV Corp.*, 823 P.2d 888, 891 (Nev. 1991) (quotation  
 16 marks, ellipses, and citation omitted). That finding—that defendant acted *unreasonably* and  
 17 knew it did—is the entirety of the legal question attendant to the claim. It is a binary choice.  
 18 Either defendant reasonably denied the claim and is not liable, or it acted unreasonably and is  
 19 thus liable.

20 In his tenth opinion, for example, Mr. Van Noy states: “Mass Mutual did interpret its  
 21 policy unreasonably in favor of its interest and against the interest of its insured.” (ECF No. 60-  
 22 6 at 113–15). Had the court issued summary judgment in favor of plaintiff, that is exactly how  
 23 the holding would have read. A finding that there was an unreasonable interpretation cannot be  
 24 separated from a finding of bad faith. So, notwithstanding the fact that the statement “Mass  
 25 Mutual acted in bad faith” never appears as such, the report seeks to short-circuit the fact-finding  
 26 process by hiding a legal conclusion under the imprimatur of Mr. Van Noy’s purported authority.

27 Mr. Van Noy’s report takes the facts of the case, perfunctorily lists a set of insurance  
 28 standards (which are never specifically referenced again), and then proceeds to render twelve

1 opinions that could just as easily find themselves at home in a court’s post-trial findings of fact  
 2 and conclusions of law. (*Id.*) Plaintiff argues that this report is no different than a doctor  
 3 testifying that another physician departed from the applicable standard of care in a medical  
 4 negligence case. (ECF No. 89 at 4). Plaintiff’s hypothetical, however vague it may be, is  
 5 inapposite. The report here offers expert testimony on not only the “heart” of the claim, as a  
 6 doctor’s testimony on the standard of care in a malpractice case would, but the entirety of the bad  
 7 faith claim—whether the denial was reasonable.

8       Courts regularly exclude expert testimony that makes those sorts of sweeping  
 9 generalizations, particularly when the balance of the expert’s testimony opines as to the  
 10 reasonableness of a party’s conduct. *See U.S. v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999);  
 11 *Aguilar v. Int’l Longshoreman’s Union, Local #10*, 966 F.2d 443, 447 (9th Cir. 1992); *Dubinsky*  
 12 *v. Liberty Surplus Ins. Corp.* No. 08-cv-6744, 2010 WL 11506086, at \*9, n.65 (C.D. Cal. June  
 13 15, 2010). Considering the weight of that precedent, and the fact that this court finds no clear  
 14 error necessitating reconsideration of its previous order, plaintiff’s motion to reconsider the  
 15 decision striking Mr. Van Noy’s report is DENIED.

16       b. Motion to Reconsider Summary Judgment

17       Plaintiff also asks the court to reconsider its decision awarding defendant partial  
 18 summary judgment. *See* (ECF No. 84). The court declines to do so.

19       Plaintiff’s motion for reconsideration spends most of its time parroting arguments that  
 20 this court heard in support of the original motion and rejected. Now, plaintiff spends eighteen  
 21 pages claiming that the court “misunderstood or overlooked” her characterizations of the  
 22 evidence or attacking the authenticity of evidence.<sup>2</sup> The court misunderstood or overlooked  
 23 nothing. It has read the arguments and considered the evidence—twice. There is no *genuine*  
 24 dispute of material fact, and the grant of partial summary judgment was appropriate.

25  
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<sup>2</sup> Even assuming that there was an issue with the authentication of exhibits, as plaintiff claims, this court’s prior order  
 27 made clear “that information contained in an inadmissible form may still be considered for summary judgment if the  
 28 information itself would be admissible at trial.” (ECF No. 83 at 5). There is no reason to question the authenticity of  
 any of the documents at issue, and Federal Rule of Evidence 904 provides that authenticity may be established by  
 the “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken  
 together with all the circumstances.”

1                   *i. Bad Faith*

2                   This court’s order granting summary judgment on plaintiff’s bad faith claim was  
 3 premised on plaintiff’s failure to provide a single piece of evidence in support of the claim other  
 4 than her own *ipse dixit* characterizations of the evidence. *See* (ECF No. 83). Neither her  
 5 disagreement with the court, nor the fact that she “responded” to the facts the court determined  
 6 were undisputed are enough to create a *genuine* dispute of material fact that precludes summary  
 7 judgment.

8                   As this court has already stated, to prevail on a bad faith claim, a plaintiff must show “the  
 9 absence of a reasonable basis for denying benefits and the defendant’s knowledge or reckless  
 10 disregard of the lack of a reasonable basis for denying the claim.” *Falline*, 823 P.2d at 891  
 11 (quotation marks, ellipses, and citation omitted). This district has granted summary judgment  
 12 under Nevada law to insurers in bad faith claims where the insurer had a “reasonable basis to  
 13 take the position that it did.” *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh,*  
 14 *Pennsylvania*, 863 F. Supp. 1237, 1242 (D. Nev. 1994); *see also Schumacher v. State Farm Fire*  
 15 *& Cas. Co.*, 467 F. Supp. 2d 1090, 1096 (D. Nev. 2006).

16                  Plaintiff appears to misapprehend the scope of a bad faith insurance claim. Whether  
 17 defendant is right or wrong in its determination that plaintiff’s claim is subject to the mental  
 18 disorder limitation is wholly irrelevant to a bad faith claim. Whether defendant correctly applied  
 19 that term of the policy is the subject of the unadjudicated breach of contract claim. What *is*  
 20 relevant to a bad faith claim is the process defendant undertook to reach its conclusion.

21                  The evidence shows that defendant possessed and reviewed reports from several different  
 22 physicians (including plaintiff’s own physicians). Further, the evidence shows that, upon review  
 23 of these reports, defendant determined that the mental disorder limitation applied. That  
 24 determination—correct or not—was based on evidence that was in defendant’s possession at the  
 25 time the limitation was applied.

26                  To recount, again, Dr. Mortillaro’s report states that plaintiff’s “clinical presentation was  
 27 consistent with the diagnosis of a Somatic Symptom Disorder.” (ECF No. 54-22). In total, four  
 28 of the physicians defendant engaged to review the file indicated some level of somatic

1 presentation, and four of plaintiff's physicians concluded the same. *See* (ECF Nos. 54-9 (Dr.  
 2 Klein); 54-20 (Dr. Mortillaro); 54-21 (Dr. Kadushin); 54-30 (Dr. Tupper); 54-41 (Dr. Folk-  
 3 Barron); 54-43 (Dr. Nagy); 54-45 (Dr. Travnicek); 54-46 (Dr. Markes)). That evidence provides  
 4 a reasonable (even if incorrect) basis to invoke the mental disorder limitation.

5 The court concedes that it cited to Dr. Cestkowski's report in its original order, and that  
 6 report was not acquired until after defendant invoked the mental disorder limitation. *See* (ECF  
 7 83 at 10–11) (citing ECF No. 54-7). So, plaintiff fairly asserts that defendant could not have  
 8 considered the report as such. However, the record also includes instances of defendant's  
 9 consulting physicians referring to Dr. Cestkowski's treatment. *See* (ECF No. 54-31 at 3; 54-37  
 10 at 15). The court sees no plausible reason for a consulting physician to reference Dr.  
 11 Cestkowski's treatment unless it had "considered" it. Thus, despite the court's incorrect citation  
 12 in the original order, there remains support for the conclusion that defendant considered  
 13 plaintiff's treatment history, including Dr. Cestkowski's treatment.

14 The fact there is evidence to support both conclusions—that plaintiff's disability was  
 15 primarily mental and subject to the limitation, or primarily physical and not—is exactly the sort  
 16 of genuine dispute in coverage that defeats a bad faith insurance claim. *See Pioneer*, 863 F.  
 17 Supp. at 1242. The fact that there is evidence to support both conclusions defeats the bad faith  
 18 claim, although it does not defeat the breach of contract claim. That breach of contract claim  
 19 will require the factfinder to be the ultimate arbiter of which interpretation of the evidence is  
 20 correct. However, the fact that a jury *could* conclude that plaintiff's interpretation of the  
 21 evidence is correct does not require this court to disturb its finding that, as a matter of law,  
 22 defendant had a reasonable basis to deny the claim—even if that reasonable basis is ultimately  
 23 proven to be incorrect.

24 To be clear, the court has not and does not express an opinion on whether invocation of  
 25 the mental disorder limitation was correct. That dispute is the heart of the remaining claim.  
 26 Indeed, it is precisely this dispute that leads to the court referring to the disability as the  
 27 "purported disability," nomenclature plaintiff takes issue with. Because the characterization of  
 28 the disability as primarily physical or mental is the heart of the still unadjudicated breach of

1 contract claim, it is wholly inappropriate for the court to refer to it as one or the other. Thus,  
 2 referring to it as the “purported disability” is not an acceptance of defendant's characterization of  
 3 the evidence as plaintiff claims it is; it is a recognition that plaintiff provides evidence that  
 4 purports to show the disability is primarily physical when defendant's claims process determined  
 5 otherwise.

6 Considering all this, the court will not disturb its prior order. Plaintiff's motion to  
 7 reconsider the court's grant of summary judgment as to the bad faith claim is DENIED.

8 *ii. Nevada Unfair Claim Settlement Practices Act*

9 For the same reasons, the court also DENIES plaintiff's motion as to the NRS 686A.310  
 10 claim. As determined for the second time above, there were reasonable grounds for defendant to  
 11 deny coverage. It had evidence from several physicians that plaintiff exhibited somatic  
 12 symptoms. At the risk of sounding repetitive, the court, again, notes that this does not mean that  
 13 defendant was correct in its determination; it means that there was an evidentiary basis for it such  
 14 that liability was not “reasonably clear” under NRS 686A.310(1)(e).

15 To that same end, the court is not persuaded by plaintiff's argument that defendant did  
 16 not make a coverage decision on October 31, 2016, when it began paying the claim under a  
 17 reservation of rights. Defendant's employee noted in his log of the call on October 31, 2016, that  
 18 he advised plaintiff defendant was “approving the claim under reservation of rights.” (ECF No.  
 19 54-18 at 2). Approving a claim is making a decision on the claim, even if defendant reserves its  
 20 rights to invoke the policy's limitations upon receipt of further information. The court will not  
 21 revisit its decision as to NRS 686A.310(1)(c) or (d).

22 Further, plaintiff mischaracterizes this court's prior order. The court never stated that the  
 23 policy required an appeal. It stated that plaintiff did not avail herself of the opportunity to appeal  
 24 when it was presented to her. (ECF No. 83 at 11–12) (“Similarly, defendant could not have  
 25 compelled plaintiff to initiate litigation when it gave plaintiff an opportunity to appeal its  
 26 decision with a new claim examiner.”) That plaintiff subjectively felt an appeal would be futile  
 27 does not equate to defendant forcing her to litigate the claim such that defendant violated Nevada  
 28 law. Plaintiff cannot say she was “forced” to take an action when she was presented with two

1 alternatives—appeal or litigate—and chose one. Thus, the court will not reconsider its decision  
2 as to NRS 686A.310(1)(f).

Finally, as to NRS 686A.310(1)(a)'s prohibition on an insurer's "[m]isrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue," plaintiff presents no new argument. She simply repeats, in the same order, the facts that this court considered in the underlying motion for summary judgment except this time with the caveat that "a reasonable jury" could conclude the opposite of the court. *Compare* (ECF No. 60 at 24) *with* (ECF No. 84 at 13). There is no evidence supporting that assertion. The court will not reconsider its decision as to NRS 686A.310(1)(a), and thus DENIES plaintiff's motion in its entirety as to claims brought under NRS 686A.310 *et seq.*

### *iii. Punitive Damages*

12 The court also reaffirms its grant of summary judgment as to punitive damages. The  
13 court has, again, determined defendant's conduct was reasonable, even if it was incorrect.  
14 Plaintiff provides no evidence of the specific intent necessary for an award of punitive damages  
15 other than her own evaluation of defendant's conduct. *See Ainsworth v. Combined Ins. Co.*, 763  
16 P.2d 673, 675 (1988); *Pioneer*, 863 F. Supp. at 1251. The court will not reconsider its decision  
17 based on what plaintiff argues a hypothetical "reasonable jury" might conclude. Defendant  
18 undertook a four-year investigation. It told plaintiff that it reserved its rights "to invoke at any  
19 time, any provision contained in" the policy. (ECF No. 54-18). That plaintiff thinks defendant  
20 incorrectly applied the policy's terms does not mean defendant committed fraud; it means, at  
21 most, defendant was wrong. The court will not reconsider its decision on punitive damages.

#### iv. *Breach of Contract*

23 Plaintiff also moves for reconsideration of this court's conclusion that she bears the  
24 burden of proving her total disability was physical such that the mental disorder limitation did  
25 not apply. The court declines to do so.

26 "It is well established that when an insured has proved a loss apparently within the  
27 terms of the policy, the burden is on the insurer to show that such loss was produced by a cause  
28 which is excepted from the coverage." *Nat'l Auto. & Cas. Ins. Co. v. Havas*, 339 P.2d 767, 768

(Nev. 1959) (citations omitted). While defendant accepted the claim on October 31, 2016, it reserved its rights to define the specific contours of that acceptance later. *See* (ECF No. 54-18). Thus, plaintiff has not “proved a loss apparently within the terms of the policy.” *Havas*, 339 P.2d at 768. Defendant, in its acceptance of the claim did not specify whether the claim was being accepted as a total physical disability or a total disability subject to the mental disorder limitation. While it is true that if defendant had initially determined the disability was physical and later amended its decision it would hold the burden of proof under *Havas*, that is not what happened here. Defendant accepted the claim under a “reservation of rights” to investigate the specific scope of the claim. (ECF No. 54-18).

Further, the policy contains language that plaintiff must provide continuing “proof” of total disability to receive payment. This district has determined that, in a suit involving invocation of the mental disorder limitation in a policy with substantially the same language, the plaintiff bears the burden of proof on this issue and must prove “that her impairments are not due to mental illness.” *Feldsher v. Liberty Life Assur. Co. of Boston*, No. 2:13-CV-00533-LDG, 2014 WL 3611910, at \*9 (D. Nev. July 18, 2014).

It is true that *Feldsher*—and other cases defendant cites—arise under the ERISA framework. ERISA cases are typically subject to an abuse of discretion standard when the plan administrator retains “discretion,” which results in a markedly different procedural posture. *See generally Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1296 (9th Cir. 2010). However, even considering this differing procedural posture, *Feldsher* and the other ERISA cases are more applicable than *Havas* here. Plaintiff has not definitively proven her loss, therefore there is no clear comparison to *Havas*. Defendant is not completely rejecting the claim, it is categorizing what portion of the policy is applicable.

As Judge George put it in *Feldsher*:

Ultimately, the medical evidence before the parties must be interpreted. [Plaintiff] argues the record never concludes that her impairments are due to mental illness. [defendant] argues that, while never conclusive, the record “contains substantial evidence” to support its conclusion. Balancing these interpretations of the record, the Court finds that [plaintiff] bears the burden of demonstrating that her impairments are not due to mental illness.

1 While ERISA's abuse of discretion standard provides the ultimate threshold for review, the court  
 2 sees no reason to discount *Feldsher*'s conclusion as to burden of proof simply on account of  
 3 necessary evidentiary threshold required by an abuse of discretion standard. The court will not  
 4 revisit its decision on burden of proof and DENIES plaintiff's motion on this ground.

5       v. *FRCP 54(b) Certification*

6 Plaintiff also requests, in the alternative, that this court certify its decision on all the  
 7 foregoing grounds as final so that it may immediately appeal those decisions. (ECF No. 84 at  
 8 17). The court will not do so.

9       “When an action presents more than one claim for relief ... the court *may* direct entry of a  
 10 final judgment as to one or more, but fewer than all, claims or parties only if the court expressly  
 11 determines that there is no just reason for delay.” Fed. R. Civ. P. 54(b) (emphasis added).  
 12 Issuance of a certification of final judgment is discretionary. *Curtiss-Wright Corp. v. Gen. Elec.*  
 13 *Co.*, 446 U.S. 1, 10 (1980).

14 Plaintiff's primary argument is that the court has “hamstrung” her by striking her expert's  
 15 testimony. (ECF No. 84 at 18). Plaintiff is correct insofar as the court struck the expert report,  
 16 but she is incorrect as to her overall assessment. The court found Mr. Van Noy qualified and  
 17 reliable. (ECF No. 83 at 7–8). There is nothing preventing her from presenting his testimony to  
 18 the jury as to the breach of contract claims. The court struck his report because it was replete  
 19 with legal conclusions in its current state. (*Id.* at 9)

20       Further, plaintiff argues that judicial resources will be conserved if she is allowed to  
 21 immediately appeal. (ECF No. 84 at 18; 88 at 14). While it is true that, from her perspective,  
 22 resources might be conserved if she is successful on this initial appeal, the opposite is true for  
 23 defendant. Were the court to grant certification and allow an immediate appeal, regardless of the  
 24 outcome of that appeal, there will be a trial on at least the breach of contract claim. At the  
 25 conclusion of that trial, there is the distinct possibility of a second appeal as to the final  
 26 disposition of the still unadjudicated breach of contract claim, from either party. It is most  
 27 efficient for the parties to bring a single appeal of all issues in this case rather than engaging in  
 28 piecemeal “yo-yo” litigation at the Ninth Circuit in the meantime. *See Cobble Dick v. United*

1 *States*, 309 U.S. 323, 325 (1940) (“Since the right to a judgment from more than one court is a  
2 matter of grace and not a necessary ingredient of justice, Congress from the very beginning has,  
3 by forbidding piecemeal disposition on appeal of what for practical purposes is a single  
4 controversy, set itself against enfeebling judicial administration.”)

5       Further, a stay awaiting the Ninth Circuit's decision on an appeal of the certified issues  
6       would prejudice plaintiff. It creates the possibility of a much larger damages award, as any  
7       potential contract damages would continue to accrue during the pendency of the appeal. It would  
8       be unfair to defendant to allow damages to inflate based on stay pending appeal when that appeal  
9       could be brought just as effectively on both the order and the trial verdict at once.

## 10 || IV. Conclusion

11 | Accordingly,

12 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motions for  
13 reconsideration (ECF Nos. 84–85) be, and the same hereby are, DENIED.

14 DATED THIS 3<sup>rd</sup> day of February, 2023.

James C. Mahan  
JAMES C. MAHAN  
UNITED STATES DISTRICT JUDGE